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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-165

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor,

*Appellants,*

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

*Appellees.*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

## JURISDICTIONAL STATEMENT

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ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, as Trustees of the Property of Penn Central Transportation Company, Debtor,

*Appellants,*

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

*Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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## JURISDICTIONAL STATEMENT

Appellants Robert W. Blanchette, Richard C. Bond and John H. McArthur, as Trustees of the Property of Penn Central Transportation Company, Debtor, appeal from an order of a three-judge district court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 743-744.

## OPINIONS BELOW

The opinion and concurring opinion in the District Court, reprinted in the Joint Appendix[1] at pp. 9-81, have not yet been officially reported.

## JURISDICTION

Each of the three actions below was initiated as a suit in the district court for injunctive and declaratory relief against the enforcement of certain provisions of the Regional Rail Reorganization Act of 1973 on constitutional grounds. The actions by Richard Joyce Smith (C.A. No. 74-1107) and by Penn Central Company (C.A. No. 74-1149) were originally brought in the United States District Court for the District of Columbia; the action by Connecticut General *et al.* (C.A. No. 74-189) was brought in the United States District Court for the Eastern District of Pennsylvania. Three-judge courts having been convened pursuant to 28 U.S.C. §§ 2282 and 2284, the actions were consolidated for disposition before the three-judge court in the Eastern District of Pennsylvania. The injunction and declaratory judgment order of that court on cross-motions for summary judgment, which is reprinted in the Joint Appendix at pp. 82-83, was entered on June 25, 1974. On July 2, 1974, appellants George P. Baker,[2] Robert W. Blanchette and Richard C. Bond, Trustees, filed in the district court a notice of appeal to this Court, which is printed in the Joint Appendix at p. 384. Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§ 1252 and 1253.

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[1]Copies are today being lodged with the Clerk of a Joint Appendix designed both for this action and for the appeals from the same judgment below taken by the United States and other governmental defendants and by the New Haven Trustee (Joint Appendix, pp. 385-90).

[2]John H. McArthur succeeded George P. Baker as a Trustee on July 22, 1974.



## STATUTE INVOLVED

The statute involved in this appeal is the Regional Rail Reorganization Act of 1973, P.L. 93-236, 45 U.S.C. §§ 701-793, which is printed in the Joint Appendix at pp. 391 *et seq.*

## QUESTIONS PRESENTED

1. Did the court below properly conclude that appellant Trustees could not maintain an action in the Court of Claims to recover any amount due the estate for fair and just compensation for (a) the rail properties the estate would be required to convey to Consolidated Rail Corporation, and (b) any erosion of the Penn Central estate beyond constitutional limits?

2. Did the court below properly conclude that, because the Act does not provide just compensation for erosion of the Penn Central estate beyond constitutional limits, Section 303 of the Act, relating to the valuation of the Penn Central rail properties; Section 304(f) of the Act, requiring continued rail operation by Penn Central; and Section 209(c), authorizing the certification of the final system plan to the Special Court, offend the Fifth Amendment and are unconstitutional absent a remedy against the United States in the Court of Claims?

3. Did the majority of the court below properly decline to decide whether the Act is unconstitutional because it requires transfer of Penn Central's rail properties to Consolidated Rail Corporation without the assurance of compensation which would satisfy the requirements of the Fifth Amendment?

4. If the court below was in error in declining to reach that question, or if the issue is otherwise now ripe for decision, is there adequate assurance that the consideration specified in the Act to be paid to the Penn Central estate

for such rail properties will satisfy Fifth Amendment requirements?

5. If a Court of Claims remedy exists, does it save the constitutionality of the Act?

## STATEMENT OF THE CASE

These actions challenge the constitutional validity of various provisions of the Regional Rail Reorganization Act of 1973 (45 U.S.C. Secs. 701-793) (the Act), which was signed by the President on January 2, 1974.

The Act represents an attempt by the Congress to deal with the problems presented by the fact that a number of major railroads in the Northeast and Midwest are in reorganization pursuant to Section 77 of the Bankruptcy Act. In general, the Act creates a new Government corporation, the United States Railway Association (USRA); charges it with responsibility, subject to Congressional approval, to design a "final system plan" for restructured rail freight service in the Northeast and Midwest regions; creates a new private corporation, Consolidated Rail Corporation (Conrail), to acquire, own and operate the rail properties designated in the final system plan; and, subject to certain preliminary findings required by Section 207(b) of the Act, requires the railroads in reorganization to convey to Conrail such of their rail properties as are designated in the final system plan in return for certain securities and other considerations specified in the statute.

Section 207(b) of the Act requires each reorganization court to determine whether the railroad in reorganization under its jurisdiction will be made subject to the compulsory conveyance provisions of the Act. First, each reorganization court is directed to determine, within 120 days of January 2, 1974 (the 120-day hearing), whether the railroad in reorganization can be reorganized on an income basis within a reasonable time under Section 77 of the



Bankruptcy Act and whether the public interest would be better served by such reorganization than by reorganization under the Act. If both determinations are affirmative, that railroad ceases to be a railroad in reorganization within the meaning of the Act, is no longer subject to the compulsory conveyance and other mandatory provisions of the Act, and continues its reorganization efforts under Section 77.

Second, if the railroad has not been excluded from the Act as a result of the 120-day hearing, each reorganization court is required by Section 207(b) to find, within 180 days of January 2, 1974 (the 180-day hearing), whether the Act provides "a process which would be fair and equitable to the estate of the railroad in reorganization." If it finds that it would not, again the railroad ceases to be a railroad in reorganization within the meaning of the Act and is no longer subject to the compulsory conveyance and other mandatory provisions of the Act. In that event, Section 207(b) directs the reorganization court to dismiss the reorganization proceedings. The decisions of the reorganization courts are reviewable, under Section 207(b), in the "Special Court" — a district court of three judges created pursuant to Section 209(b) of the Act. Section 207(b) provides that there shall be no review of such decisions of the Special Court.

These actions relate to the application of the Act to the estate of Penn Central Transportation Company, Debtor, in reorganization under Section 77 of the Bankruptcy Act (Penn Central). The 120-day hearing held with respect to Penn Central resulted in a finding by the reorganization court on May 2, 1974 that it was not reorganizable on an income basis within a reasonable time. The opinion and order of the reorganization court appear in the Joint Appendix at pp. 84-103.

The 180-day hearing held with respect to Penn Central resulted in a finding by the reorganization court that the

process of the Act was not fair and equitable to the Penn Central estate. The opinion and order of the reorganization court on this issue appear in the Joint Appendix at pp. 124-52. That decision has been appealed by the Government defendants and others to the Special Court.[3]

Shortly after the Act became law, the first of these actions was filed (Joint Appendix p. 161). The complaint alleged, *inter alia*, that the Act worked a permanent taking of the property of the Penn Central estate without assurance that the payment of just compensation required by the Fifth Amendment would be made; that the Act contravened the Fifth Amendment in failing to provide compensation for the erosion of the Debtor's estate during the interval between the enactment of the Act and the ultimate conveyance of rail properties to Conrail, during which period the Act required the railroad to continue operations; and that the Act violated the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution. Similar allegations were made in the other two complaints (Joint Appendix, pp. 261, 341). Appellant Trustees intervened as parties defendant in each of the three actions (Joint Appendix, pp. 191, 309, 358).

On June 3, 1974, the cases were submitted to the court below on cross-motions for summary judgment. The defendants, including appellant Trustees, asserted that there could be no deficiencies in just compensation as plaintiffs alleged, because the estates in reorganization would in any event be made whole by way of suit in the Court of Claims,

[3]Jurisdiction of the reorganization court to make the 120-day and 180-day decisions has been challenged by the Trustee of the New Haven Railroad, a creditor and stockholder of Penn Central. Appeals from both decisions by the New Haven Trustee are now pending before both the Special Court and the Court of Appeals for the Third Circuit.



both for any deficiency in the compensation received from Conrail for rail properties and for any claims they might have if it were determined that an unconstitutional erosion of the estate had taken place or would take place prior to the date of the mandatory conveyance. Defendants also denied that the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution was violated.

On June 25, 1974, the court below filed an opinion and entered an order enjoining and holding null and void three provisions of the Act (Joint Appendix, pp. 9-83). All of the judges agreed that the Act was unconstitutional in failing to provide compensation for interim erosion which would be suffered by the Penn Central estate during the planning period, and that an action against the United States in the Court of Claims was not available to remedy this deficiency. On that basis the court enjoined enforcement of, and declared null and void, Section 304(f) of the Act, which requires continued rail operations during the planning period, and declared Section 303 of the Act null and void insofar as it fails to provide compensation for interim erosion. A majority of the court held Section 207(b) of the Act null and void so far as it precluded a form of liquidation under Section 77 of the Bankrupty Act by a railroad excluded from the mandatory provisions of the Act after the 180-day hearing. Because of these conclusions, the court enjoined USRA from certifying a final system plan to the Special Court pursuant to Section 209(c) (Joint Appendix, p. 82).

The court also concluded that the questions whether the mandatory conveyance of rail properties to Conrail pursuant to the Act would violate Fifth Amendment rights, and whether a suit in the Court of Claims would be available to remedy any deficiency in this respect, were premature, since the 180-day decision as to Penn Central had not yet been made, the final system plan had not yet

been approved by Congress, and the conveyance would have to be ordered by the Special Court (Joint Appendix, pp. 23-25). Judge Fullam, in his concurring opinion, believed that these issues were ripe for decision.

## THE QUESTIONS ARE SUBSTANTIAL

These cases present important questions as to the constitutional validity of major provisions of the Regional Rail Reorganization Act of 1973. The order of the court below, finding particular sections to be unconstitutional and on that basis enjoining USRA from certifying a final system plan to the Special Court, will, unless reversed, effectively nullify the entire Act.

### 1. The Act Does Not Violate Any Fifth Amendment Rights.

No one disputes that the Fifth Amendment guarantees to the Penn Central estate just compensation, both for the value of any rail properties which are required to be conveyed to Conrail from Penn Central by the final system plan, and also for any loss which the estate may suffer from interim erosion resulting from mandatory continued operation of Penn Central beyond the point where that operation constitutes a "taking" of its property. What is in dispute is whether the Act satisfies the Fifth Amendment.

**As to Interim Erosion** — The court below concluded that the Act was deficient because it provided no basis upon which the estate could be compensated for a taking of its property by reason of the mandatory continued operation of Penn Central at the expense of the Penn Central estate. That issue is ripe for decision because, as the court below found (Joint Appendix, p. 40), "a significant possibility exists that a point of erosion either has been or may soon be reached." The court rejected the argument that the estate



had an assurance of compensation by a suit in the Court of Claims.

We believe that rejection was erroneous. The Act, in many of its sections, expressly repeals or makes inapplicable the provisions of various laws or limits the jurisdiction of the courts,[4] but nowhere suggests or intimates that it intends to exclude or make inapplicable 28 U.S.C. Sec. 1491, conferring jurisdiction on the Court of Claims to give judgment upon any claim against the United States founded either upon the Constitution, an act of Congress, or a contract. The legislative history to which the court refers is, at best ambiguous. While the court below reads it as indicating an intention to exclude a Court of Claims remedy, it is at least equally susceptible of the interpretation that members of Congress did not expect that a "taking" would ever occur. In light of the cardinal principle of constitutional adjudication that a constitutional construction should be accepted if fairly possible (*United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)), the Act should be interpreted as not excluding an ultimate remedy in the Court of Claims.

**As to Final Mandatory Conveyance** — The validity of the provisions of the Act requiring conveyance by Penn Central to Conrail of the rail properties designated in the final system plan is an issue of great importance which we believe, contrary to the conclusion of the court below, is ripe for decision. That court cited three bases for its conclusion that consideration of this issue would be premature. The first, that the 180-day decision as to Penn Central had not yet been made, is no longer true (see p. 11, *infra*). The second, that Congress must act before any final system plan can be implemented, is inaccurate; as the concurring opinion below points out, it is not necessary that Congress

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[4] See Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), 304(c), 304(f), 601(a)(2), 601(b), 601(c).

take any affirmative action, but rather only that the final system plan not be disapproved by either house, with the added provision that USRA continue to submit plans to Congress until one is not so disapproved. See Sec. 208. The third basis cited by the court, that there must be "judicial action" by the Special Court prior to any transfer, is likewise misleading; Section 303(b) does not appear to give that court any discretion in directing the conveyance once it receives the final system plan.

We believe, therefore, that there is before the Court for decision the issue as to the validity of the mandatory conveyance provisions of the Act. We urged in the court below, and will urge in this Court, that the provisions for compensation specified in the Act do not provide assurance that just compensation will be paid. Payment is to be made largely in common stock of Conrail, which may or may not have any value, plus (perhaps) other Conrail securities and a limited amount of USRA government-guaranteed bonds which Conrail can borrow from USRA in return for its own debt securities, plus unnamed "other benefits." Sec. 206(d)(1). After the conveyances have been made, the Special Court (with an appeal to this Court from its decision) will review the determinations in the final system plan as to the value of the property conveyed and the fairness and equity of the consideration tendered for those properties. The court, however, is limited in the relief it can grant. Ultimately, if reallocation of the securities among the several estates is inadequate, it may enter a judgment against Conrail for any deficiency (Sec. 303(c)(2)). As the concurring opinion below points out, "if the value of Conrail's stock is inadequate, a judgment against that same equity would add nothing, and would be essentially circuitous" (Joint Appendix, p. 77).

Nonetheless, as with the interim erosion, we believe that plaintiffs can be made whole for any deficiency which may result from the operation of Section 302(c)(2) of the Act by



way of an action in the Court of Claims. Congress has, in effect, ordered that the rail property of Penn Central designated in the final system plan be taken from the Penn Central estate for public use. This is a classic case of a "taking" within the meaning of the Fifth Amendment, which creates a corresponding constitutional duty to pay just compensation. For the reasons already stated (p. 9, *supra*), we believe that the Act does not preclude a remedy by way of a suit in the Court of Claims.

### 2. The Issues Are Not Rendered Moot by the Penn Central Reorganization Court's 180-Day Decision.

On July 1, 1974, the Penn Central Reorganization Court, after hearing pursuant to Section 207(b), found that the processes of the Act were not fair and equitable to the Penn Central estate (Joint Appendix, p. 152). Essentially, the decision rested on the same constitutional objections to the adequacy of the compensation provided by the Act which have been noted above, and on the court's further conclusion that no Court of Claims remedy was available. The court's order pursuant to Section 207(b) was that the Penn Central estate should not be reorganized under the Act. However, the court stayed the effectiveness of its order pending its review in the Special Court.

Appeals to the Special Court were filed on July 11, 1974, and under Section 207(b) the decision by that court is to be made within 80 days — by September 29, 1974. Presumably, since the issues before the Special Court are essentially those which are before this Court on these appeals, the Special Court will take appropriate steps to delay any final disposition of the appeals to it until this Court has made its decision, or will provide in its order for modifications thereof depending on what this Court decides. If that expectation proves false, and if the Special

Court enters a final — and under Section 209(b) unappealable — order excluding the Penn Central estate from the mandatory provisions of the Act, we will promptly so advise the Court.

### 3. The Decision Below Holding Invalid Section 207(b) of the Act, Insofar as It Directs Dismissal of the Section 77 Proceeding, Is Separable.

Section 207(b) of the Act directs that, if a reorganization court finds the process of the Act not to be fair and equitable, "it shall dismiss the reorganization proceeding." This provision would become operative if the Special Court were to affirm the decision of the Penn Central reorganization court, either prior to or following a decision by this Court on the constitutional issues discussed above. A majority of the court below found that this provision of Section 207(b) was in conflict with the constitutional command that Congress establish "uniform laws on the subject of bankruptcies" (Article I, Section 8, Clause 4). See *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

We believe the decision below to be correct. This provision of Section 207(b) would effect a partial repeal of Section 77, since it would prevent continued use of that section to effect an appropriate reorganization of a railroad to which it applied. As the concurring opinion below noted, reorganization on an income basis within a reasonable time (which the 120-day decision shows is not available to Penn Central) is by no means the only type of reorganization which can be effected under Section 77. *Cf. New Haven Inclusion Cases*, 399 U.S. 392 (1970). The partial repeal of Section 77, however, applies only to railroads in the northeastern and midwest region defined in Section 102(13) of the Act — a classification of debtors on the basis of geography which appears to be in direct conflict with the



uniformity requirements of Article I, Section 8, Clause 4 of the Constitution.

The invalidity of this section, however, does not affect the validity of the Act as a whole. Indeed, it is difficult to understand why the provision was included, except perhaps for its *in terrorem* effect. In the circumstances, the separability provision of Section 604 of the Act is plainly applicable.

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of August, 1974, pursuant to Rules 33(1) and 33(3)(b) of the Rules of this Court, served all parties required to be served by causing three copies of the Jurisdictional Statement to be mailed first class, postage prepaid, to the following persons:

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